Supreme Court, U.S.
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91-1722

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1991

WILLIAM DEAN "WIG" BARROW,

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The trial court erred in failing to give appellant's requested jury instruction No. 1 which would have correctly advised the jury that evidence of petitioner's good faith reliance on "apparent authority", if believed, would negate the required element of specific intent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on December 17, 1991.

CITATIONS TO OPINION BELOW

The decisions of the Court of Appeals dated December 17, 1991, and January 30, 1992, are unreported, and are found in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

TITLE 18, UNITED STATES CODE,
§1956(a)(3)(B) and (C)

(3) Whoever, with the intent--

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 0 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made

by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

TITLE 31, UNITED STATES CODE §5324.

Structuring transactions to evade reporting requirements prohibited.

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a)

that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring any transaction with one or more domestic financial institutions.

STATEMENT OF THE CASE

Petitioner is a former Florida State Senator, County Prosecutor and, more recently, a self-described "country lawyer" practicing in the small west Florida community of Crestview. On March 14, 1990, a two-count indictment was returned against Petitioner charging in Count I a violation of 18 U.S.C. 1956(a)(3)(B) and (C) which is specifically tailored for "sting" type undercover operations; and, in Count II "Structuring" under Title 31, Sections 5324(3) and 5322(a). Each of these sections of the United States Code are "specific intent" crimes. Indeed, the former of these statutory sections criminalizing, inter alia, the wire transfer of "property represented by law enforcement officer to be the proceeds of specified unlawful activity" . . . is specifically designed for law

enforcement "sting" operations. In addressing this then proposed (a)(3) amendment, Senator Joseph Biden, Chairman of the Judiciary Committee remarked as follows:

> The first part of the Amendment contains a mens rea requirement that is stricter than that in 1956(a)(1). The Appellant would have to have specific intent to promote specified unlawful activity, to conceal what he believes to be the proceeds of such activity, or to avoid reporting requirements. It would not be sufficient, as it is under (a)(1) that the Appellant merely know that the transaction was being conducted with the second or third of these purposes in mind. 134 Con. Rec. S17, 360 (November 10, 1988).

The investigation leading to these charges was initiated by a client that Petitioner was representing on drug related state charges. As part of the representation, Petitioner sought a

"cooperation" agreement with local authorities providing for relief to the client in return for his assistance to local law enforcement. This effort involved a series of meetings between Petitioner, the client and local police agents that resulted in no clear agreement or understanding. Ultimately, Petitioner met with the supervising assistant state attorney. According to the testimony of that assistant state attorney, Petitioner reasonably understood the result to be that the client was to proceed with his efforts to "bust" a large scale marijuana organization based in Texas. Further, in return for this service, the client could reasonably expect leniency up to and including a probationary sentence. The prosecutor testified that this commitment was based upon his conversation with the police officer, Robby Hughes, that was directly involved.

Approximately two months after the initial discussions regarding cooperation, Hughes had a chance encounter with the client. He advised the client (as he testified at trial) that he had no knowledge of any "deal". With the Petitioner having assured the client that there was such a cooperation agreement, the client was understandably disenchanted. Moreover, he reported to Officer Hughes that Petitioner was continuing to encourage him to remain involved with his drug associates, ostensibly to promote his assistance to law enforcement.

Beginning in November of 1989, the client had a series of tape recorded telephone or personal visits with Petitioner. Petitioner continued to encourage the client to remain involved with his marijuana associates as part of his on-going "cooperation". Eventually, undercover

police officers visited with Petitioner in his law office representing themselves to be marijuana associates of the client. Initially these visits were for the primary purpose of paying fees to the Petitioner for representation of the client. Later, however, a police agent visited Petitioner in his law office pretending to be the leader of this marijuana organization. Although there had been no previous mention or suggestion of "money laundering", this putative leader (Luis) inquired of the Petitioner whether he would assist him in investing illicit proceeds in legitimate business. Admittedly, Petitioner actively engaged in several of these discussions relating to the investment of laundering of six and seven figure sums of money. As part of these discussions, Barrow made a series of bizarre, seemingly incredible representations. He claimed to have an IQ

of 200 to 220, earn an income of $300,000.00 to $500,000.00 per year, have connections to the military intelligence community and to be an experienced criminal lawyer who never lost a case as either a prosecutor or a defense lawyer. The undercover agent (Luis) claimed to believe all of these representations.

These discussions lead up to a meeting in Petitioner's Office on February 22, 1990. Prior to the meeting, the agent had told Barrow that he was bringing $50,000.00 to him. It was unclear whether part of that money was to be used to pay the client's fee, but, clearly the major intent was to "launder" the $50,000.00 through an investment. For reasons that the agent could not explain at trial, the plan was changed immediately prior to the meeting. The agent ultimately brought $25,000.00 to Barrow with a request that he wire transfer

the money to a (fictitious) bank account in Houston Texas. The agent advised that he would bring an additional $250,000.00 the following to be "laundered" by investment.

It was at this juncture that Petitioner committed those acts which were the basis for the two counts of the indictment. He had his two secretaries purchase various cashier's checks in the amount of $2,500.00 each. He provided those checks together with $5,000.00 in cash to his bank and arranged the wire transfer to the fictitious account in Houston, Texas.

On March 6, 1990, the agent again arranged a meeting with Barrow to provide $100,000.00 to currency to be "laundered". They were to meet at a local motel room. In a videotape recorded conversation, Barrow received the $100,000.00 and discussed various means of "laundering" the money as

well as the prospects for further such deals.

Petitioner was arrested before he was allowed to leave the motel room with the currency. Immediately after his arrest, he requested the opportunity to make a tape recorded statement during which he explained the involvement with the agents and the wire transfer as being part of his undercover efforts to assist the client in "busting" the marijuana ring.

At trial, he defended on this same basis. In his own testimony, he denied any criminal intent to violate the law. Rather, notwithstanding his failure to specifically advise any law enforcement authorities of his conduct, he described his unexpected direct involvement with the marijuana smugglers as "the nicest thing that could happen" in that he perceived that the head of the marijuana organization was coming to

him, ready to be busted. He further testified that he realized that the putative leader (Luis) was too smart for his client and that he did not trust Kilpatrick to get the undercover work done. Describing his own "super ego" he saw an opportunity to break up a major marijuana ring and to be perceived as a local hero.

As to the actual charged acts, the wire transfer of $25,000.00, he explained that he was expecting the agent (Luis) to deliver $50,000.00 for a "laundered" investment. He expressed his intention to take this sum of money to local authorities. However, when the agent (Luis) asked him only to wire transfer the money, he felt that he was being tested. With the promise of larger sums to come, he agreed to the wire transfer. And, he testified that had he not been arrested after receiving the subsequent

$100,000.00 sum, he intended to deliver that money to law enforcement agents.

He was supported in his testimony by several witnesses. His secretaries, a neighbor who is a Colonel in the United States Air Force, and his pastor all testified to discussions they had had with the Defendant prior to his arrest regarding his involvement in an undercover investigation.

In conformance with Federal Rule of Criminal Procedure 12.3, the appellant filed a pretrial notice of intent to rely upon the defense of actual or believed exercise of public authority, i.e., lack of specific intent, and entrapment. And, at the conclusion of trial, he requested the following jury instruction:

> In determining whether the government has met its burden of proving that William D. Barrow

acted willfully with a specific intent to violate a known legal duty, you should realize that if the Defendant believed in good faith that his actions were lawful or that he acted without specific intent, then it is your duty to return a verdict of acquittal.

It is William D. Barrow's contention in this case that he did not act willfully or with a specific intent to commit the currency violations alleged in the indictment. In particular, it is the Appellant's contention that because he believed in good faith that his actions were in furtherance of law enforcement, he never formed the specific intent to commit an unlawful act--a specific intent with the government must be proved beyond a reasonable doubt.

Remember also that if you find that Mr. Barrow's belief about the lawfulness of his conduct was sincere and in good faith [and objectively reasonable], it is irrelevant whether his belief was correct or

> whether the office of the State Attorney actually authorized him to engage in the currency transactions alleged. It is only the honesty and reasonableness of his belief that matters, since if the government does not prove that William D. Barrow had a specific intent to act unlawfully then he cannot be convicted.[1]

The Court denied the Defendant's requested instruction(s). Rather, the Court gave only the following "good faith" instruction:

> The defendant claims that he acted in good faith, in that he acted in furtherance of law enforcement. Good faith is a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with willfulness, which is

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[1]The trial court allowed Appellant to offer the bracketed language version as an alternative requested instruction. There was specific recognition that this orally proposed alternative would suffice for Appellant purposes.

> an essential element of the charges. The burden of proof is not on the defendant to prove his good faith, of course, since he has no burden to prove anything. The government must establish beyond a reasonable doubt the defendant acted willfully, as charged in the indictment.

After two days of deliberations, the jury returned its verdict of guilty on both counts. The defendant has since been sentenced to a term of imprisonment by the trial court.

The Defendant took direct appeal to the United States Court of Appeals for the Eleventh Circuit. On the 17th day of December, 1991, the Court affirmed the conviction without opinion. And, on the 30th day of January, 1992, the Court denied the Petitioner's Motion for Rehearing.

REASON FOR GRANTING THE PETITION

At trial, Petitioner offered evidence sufficient to entitle him to an instruction on his apparent authority/lack of specific intent defense. And, as a general proposition, a defendant is entitled to a proper instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. Stephenson v. U.S., 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896). The questions presented here is "What is the law?" Regrettably, there is no cogent answer.

> (a) Generally. No area of the substantive criminal law has traditionally been surrounded by more confusion than that of ignorance or mistake of fact or law. It is frequently said, on the one hand, that ignorance of the law is no excuse, and, on the other, that a

mistake of fact is an excuse. Neither of these propositions is precisely correct, and both are subject to numerous exceptions and qualifications. Uncertainty as to the precise significance of the defendant's mistake or ignorance of the surrounding facts is attributable in part to assertions, usually unexplained, in some decisions that the error must be a reasonable one or that the defendant is subject to conviction notwithstanding the mistake. Another source of confusion is the indiscriminate use of the phrase "ignorance of the law" to encompass both the situation in which the defendant is unaware of the existence of a statute proscribing his conduct, and that where the defendant has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct (as where, in a bigamy case, the defendant mistakenly believes that his prior divorce is valid). These two

> situations call for quite different analysis and, frequently, different results.
>
> In actuality, the basic rule is extremely simple: ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged. Indeed, it is so simple because, unlike the other defenses discussed in this chapter, it is merely a restatement in somewhat different form of one of the basic premises of the criminal law. Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense. W. LaFave & A. Scott, Jr., 1 Substantive Criminal Law, §5.1, at 575 (footnotes omitted).

This simple and compelling logic has certainly not been applied. For example, in

United States v. Rosenthall, 793 F.2d 1214 (11th Cir.) modified on other grounds 801 F.2d 378 (11th Cir. 1986) cert. denied 480 U.S. 919, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987), the defendants were convicted of drug smuggling charges. The trial court disallowed their proffered evidence that they had committed their drug crimes acting pursuant to CIA intelligence gathering activities. Similarly, the trial court rejected their proposed instructions on apparent authority.

The Eleventh Circuit affirmed on this issue by finding that "a defendant may only be exonerated on the basis of his reliance on real and not merely apparent authority". 793 F.2d at 1235.

The Court noted that the CIA had no authority to violate federal narcotics laws. Hence, it reasoned, the CIA had no real

authority to authorize the drug violations at issue.

Such rationale would not seem to reach the core issue of lack of intent. Yet, it is a prevailing view. See e.g. U. S. v. Daggan, 743 F.2d 59 (2nd Cir. 1984).

Perhaps the best illustration of the difficulty the lower courts have experienced in this area is United States v. Reyes-Vasquez, 905 F.2d 1497 (11th Cir. 1990). There, like in Rosenthal, the defendant claimed that he set up a cocaine transaction pursuant to his work in a CIA run intelligence operation. In pretrial hearing on the government's motion to prohibit such testimony, he described a plan whereby he would purchase cocaine from two members of a leftist Colombian terrorist organization, the CIA would "arrest" them, and use the threat of criminal prosecution to recruit them as informants. The trial court

prohibited the testimony based on Rosenthal and in a two to one decision, the Eleventh Circuit affirmed. The majority opinion characterized the appellant's position as different from that presented to the trial court. That is the Court found that he argued that testimony about the CIA was relevant to determine whether he had specific intent to distribute the cocaine, an essential element of his crime. It found this argument to be different from the "apparently authority" argument presented to the trial court. And, it declined to address that argument because of its finding that the Defendant had not raised the issue at the trial level. The dissenting opinion found that it had been raised both explicitly and implicitly. That is, the evidence of the defendant's good faith belief that his efforts were part of a CIA operation which would not have resulted in

the actual delivery of cocaine, was clearly evidence of lack of specific intent. In the final analysis, is that not the essence of the apparent authority defense. It is the Petitioner's position that the good faith belief in apparent authority is but a sub-species of lack of intent.

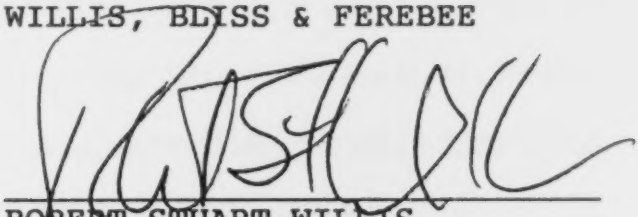
On our facts, the proposed instruction requested by the Petitioner makes that point. It would have clearly and unambiguously advised the jury as to the effect of the "apparent authority" testimony as it bore on the issue of Petitioner's specific intent. If it was a correct statement of the law, the Petitioner is entitled to relief. If it is not, the lower courts need this Court's guidance.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

WILLIS, BLISS & FEREBEE



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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to the Stephen P. Preisser, Esquire, Assistant United States Attorney, 114 East Gregory Street, Pensacola, Florida, by overnight delivery this 27 day of April, 1992.

ROBERT STUART WILLIS

APPENDIX

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 90-4050

D.C. Docket No. 90-3031-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM DEAN "WIG" BARROW,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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(December 17, 1991)

Before EDMONDSON and DUBINA, Circuit Judges, ATKINS*, Senior District Judge

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-4050

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM DEAN "WIG" BARROW,

Defendant-Appellant.

Appeal from the United States
District Court for the
Northern District of Florida

ON PETITION(S) FOR REHEARING
(January 30, 1992)

BEFORE: EDMONDSON and DUBINA, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM;

The petition for rehearing filed by the appellant is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

*Hon. C. Clyde Atkins, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

In determining whether the government has met its burden of proving that William D. Barrow acted willfully with a specific intent to violate a known legal duty, you should realize that if the Defendant believed in good faith that his actions were lawful or that he acted without specific intent, then it is your duty to return a verdict of acquittal.

It is William D. Barrow's contention in this case that he did not act willfully or with a specific intent to commit the currency violations alleged in the indictment. In particular, it is the Defendant's contention that because he believed in good faith that his actions were in furtherance of law enforcement, he never formed the specific intent to commit an unlawful act--a specific intent which the

government must prove beyond a reasonable doubt.

Remember also that if you find that Mr. Barrow's belief about the lawfulness of his conduct was sincere and in good faith, it is irrelevant whether his belief was correct or whether the office of the State Attorney actually authorized him to engage in the currency transactions alleged. It is only the honesty and reasonableness of his belief that matters, since if the government does not prove that William D. Barrow had a specific intent to act unlawfully then he cannot be convicted.

U.S. v. Wilson, 721 F.2d 967, 974, Footnote 10

Good Faith Defense to Charge of Intent to Defraud

The defendant claims that he acted in good faith, in that he acted in furtherance of law enforcement. Good faith is a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with willfulness, which is an essential element of the charges. The burden of proof is not on the defendant to prove his good faith, of course, since he has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted willfully, as charged in the indictment.